

NTSB Order No. EA-4971

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD  
at its office in Washington, D.C.  
on the 14th day of May, 2002

Respondent .

Docket SE-15472

The Administrator has appealed from the written order of Administrative Law Judge William R. Mullins, served on May 26, 1999, wherein the law judge granted respondent's Motion to Dismiss Stale Complaint under Rule 33 of the Board's Rules of Practice in Air Safety Proceedings, 49 C.F.R. § 821.33.<sup>1</sup> The

The Stale Complaint Rule states, in pertinent part:

complaint sought to suspend respondent's airman certificate for 60 days pursuant to allegations that he violated section 61.15(e) of the Federal Aviation Regulations (FAR) through his failure to notify the Administrator that he had been convicted in state court for Driving Under the Influence (DUI).<sup>2</sup>

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(..continued)

**§ 821.33 Motion to dismiss stale complaint.**

Where the complaint states allegations of offenses which occurred more than 6 months prior to the Administrator's advising respondent as to reasons for proposed action under section 609 of the Act, respondent may move to dismiss such allegations pursuant to the following provisions:

(a) In those cases where a complaint does not allege lack of qualification of the certificate holder:

(1) The Administrator shall be required to show by answer filed within 15 days of service of the motion that good cause existed for the delay, or that the imposition of a sanction is warranted in the public interest, notwithstanding the delay or the reasons therefor.

(2) If the Administrator does not establish good cause for the delay or for imposition of a sanction notwithstanding the delay, the law judge shall dismiss the stale allegations and proceed to adjudicate only the remaining portion, if any, of the complaint....

<sup>2</sup>Section 61.15 provides, in pertinent part:

**§ 61.15 Offenses involving alcohol or drugs....**

(c) For the purposes of paragraphs (d) and (e) of this section, a motor vehicle action means-

(1) A conviction after November 29, 1990, for the violation of any Federal or state statute relating to the operation of a motor vehicle while intoxicated by alcohol or a drug, or while under the influence of alcohol or a drug;

(2) The cancellation, suspension, or revocation of a license to operate a motor vehicle by a state after November 20, 1990, for a cause related to the operation of a motor vehicle while intoxicated by alcohol or a drug, or while under the influence of alcohol or a drug....

\* \* \* \*

(e) Each person holding a certificate issued under this

On appeal, the Administrator asserts that the law judge erred by finding that good cause did not exist for the delay in prosecution and by dismissing the complaint. Respondent replied, asking the Board to affirm the law judge's decision. For reasons discussed below, we grant the Administrator's appeal.

As alleged in the order of suspension (which served as the complaint) and admitted by respondent, the State of California, Department of Motor Vehicles, suspended respondent's driver's license on or about April 11, 1995, for Driving with an Excessive Blood Alcohol Level. This culminated in his conviction on May 8, 1995, in Orange County, California, of Driving Under the Influence. Respondent failed to report either of these motor vehicle actions to the FAA's Civil Aviation Security Division within 60 days as required by FAR section 61.15(e).<sup>3</sup>

On April 24, 1997, respondent completed an application to renew his airman medical certificate. At that time, he marked "yes" under "History of Driving Offenses," wrote down "1995, March 12, DUI, California," and authorized the National Driving Register (NDR) to provide to the Administrator information about

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(..continued)

part shall provide a written report of each motor vehicle action to the FAA, Civil Aviation Security Division (AAC-700), P.O. Box 25810, Oklahoma City, OK 73125, not later than 60 days after the motor vehicle action....

<sup>3</sup>In his answer, respondent admitted to violating section 61.15(e), but claimed that the stale complaint rule barred any prosecution of him. The Administrator filed a Motion for Judgment on the Pleadings which, given his disposition of respondent's Motion to Dismiss Stale Complaint, the law judge did not decide.

his driving record.

The Administrator issued a Notice of Proposed Certificate Action on March 13, 1998. This notice was issued more than six months after the alleged offense occurred and, as the Administrator readily acknowledges, the charge is stale.<sup>4</sup> In order to avoid dismissal under the Board's stale complaint rule, the Administrator must then show that good cause existed for the delay in discovering the offense and that, upon discovery, she investigated the matter with due diligence. Administrator v. Ikeler, NTSB Order No. EA-4695 at 4 (1998).

The Administrator asserts that, despite respondent's disclosure on his medical application, she could not have been aware that he had failed to timely report the DUI conviction and license suspension until the agent assigned to the case processed the information through the National Law Telecommunications System (NLETS) and received a positive response for respondent.<sup>5</sup> Between June 2 and 9, 1997, respondent's name, along with the names of thousands of other individuals who applied for medical certificates during the same period, was downloaded into the DUI Tracking System of the DUI/DWI Investigations Program, and a

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<sup>4</sup>The offenses occurred 60 days after each of respondent's motor vehicle actions when he failed to report those actions to the FAA's Civil Aviation Security Division. Therefore, they became stale, under the Board's rules, in October and November of 1995.

<sup>5</sup>In Ikeler, the respondent argued that the date on which he submitted his medical certificate application (containing the date of his DUI conviction) to the aviation medical examiner should be the date used to determine when the Administrator had knowledge of the violation. We rejected this argument.

computer tape containing the names of the applicants who were certified airmen was produced and mailed to the NDR in Washington, D.C. Then, on August 14, 1997, the NDR sent to the Administrator a tape containing 78 names, including respondent's. This type of list does not contain a reason why a state took action against an individual's driving privileges. Therefore, further analysis and record comparison was required.

On August 20, 1997, the tape was assigned to a special agent for review. The Administrator maintains that the agent already had two other tapes containing 183 names to investigate, as appropriate, and she reviewed the tapes in order of receipt. The agent began her investigation of the tape containing respondent's data on February 6, 1998. On March 13, 1998, the Administrator issued a Notice of Proposed Certificate Action to respondent.

Respondent argues that the special agent's delay in evaluating the tape was unreasonable, irrespective of whether she had a large workload during that time.<sup>6</sup> He, however, admitted to all the charges in the complaint and does not assert that, had

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<sup>6</sup>To support his argument, he cites Administrator v. Booth, 6 NTSB 212, 213 (1988), where the Board stated, in dicta, that heavy workload and an office move would be unlikely to be considered good cause under the stale complaint rule. That case may be distinguished from the instant case, since there, the delay occurred after the Administrator was aware of the alleged offense and had already begun the investigation. See also Administrator v. Holland, NTSB Order No. EA-3987 at 5 (1993), where the Administrator did not show good cause for a seven-week delay that occurred *after* the offense was discovered.

Here, the Administrator did not know of the violation until the agent processed the information on the tape through the NLETS in February 1998.

the complaint been filed sooner, he would have been better equipped to defend against the allegations and so would have denied them. Thus, it cannot be assumed that respondent's ability to defend against the charges he admitted was compromised by the delay between August 1997 and February 1998.

The purpose of the stale complaint rule is to prevent prolonged jeopardy, afford a respondent an opportunity to preserve evidence and contact witnesses, and guarantee that the Administrator pursues her investigation and prosecution with reasonable diligence. Administrator v. Dill, NTSB Order No. EA-4099 at 9.<sup>7</sup> However, as we recently noted in Ramaprakash, a case with facts similar to the instant case:

It would be arbitrary to dismiss the complaint under a rule designed to forestall evidentiary difficulties that can arise because of prosecutorial delay. Indeed, it would be particularly difficult to justify in a case of this kind, given the importance to air safety of monitoring the alcohol-related infractions of certificated airmen, and the likelihood that they would go undetected but for the self-disclosure requirements of FAR section 61.15(e).

Id. at 7.

While we would have preferred a more detailed explanation of the time period between the assignment of the tape to the special investigator and her commencement of its review, the reasons supplied are sufficient to satisfy the good cause burden in this

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<sup>7</sup>See also Administrator v. Ramaprakash, NTSB Order No. EA-4947 at 7 (2002), citing Administrator v. Gotisar, NTSB Order No. EA-4544 at 3 (1997) ("the purpose of the stale complaint rule is to ensure that respondents are not denied the opportunity to prepare a defense as a result of the Administrator's tardiness in giving notice").

instance. As we recognized in Ramaprakash, there is a strong safety-related rationale for taking into account the Administrator's need for some flexibility in the administration of this program. Our opinion, however, is not to be read as an acceptance of *any* delay, regardless of length, in all situations. It would seem that the benefit to aviation safety of monitoring alcohol-related driving infractions of certificated airmen may well be diluted if too much time is consumed in the effort to discover them.<sup>8</sup>

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<sup>8</sup>Respondent objected to the Administrator's inclusion of extra-record documents in her appeal brief. These documents were attached to correct errors in the initial decision's comparison between this case and Ikeler. The Administrator sought to show that Mr. Ikeler provided more, not less, information about his DUI conviction on his medical application. Since the law judge brought up these issues for the first time in the initial decision and the Administrator did not have an opportunity to reply, we will allow the Administrator to submit information for the purpose of correcting the record, under these unique circumstances.

**ACCORDINGLY, IT IS ORDERED THAT:**

1. The Administrator's appeal is granted;
2. The order dismissing the complaint as stale is reversed; and
3. The case is remanded to the law judge for a ruling on the Administrator's Motion for Judgment on the Pleadings.

BLAKEY, Chairman, CARMODY, Vice Chairman, and BLACK, Member of the Board, concurred in the above opinion and order. HAMMERSCHMIDT and GOGLIA, Members, did not concur, and Member GOGLIA submitted the following dissenting statement, with which Member HAMMERSCHMIDT joined.

I dissent on Notation 7336B, Administrator v. Shrader. It should not be re-opened. The reasons supplied continue to be insufficient in satisfying the burden of the Administrator to show good cause to avoid dismissal of the complaint. It is stale under the regulation that requires the Administrator to take timely action. There is no good reason for the Administrator to now take disciplinary action based on an April 1995 event. The Administrator must take more timely action.